No. 13312

In the United States Court of Appeals for the Ninth Circuit

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

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OPINION BELOW

The district court did not write an opinion. Its oral statement upon setting aside the jury verdict and directing entry of judgment for nominal damages is set out in the Record at pages 615–619.

JURISDICTION

This is an appeal from a condemnation judgment entered February 7, 1952 (R. 49–53). Notice of appeal was filed February 29, 1952 (R. 54). The jurisdiction of the district court was invoked under the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241; April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171, and by Title II of the Second War Powers Act of March 27, 1942, 56

Stat. 176, 177, sec. 201, 50 U. S. C. (1940 ed.) Supp. V, sec. 171 (a). The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether the district court properly set aside the jury verdict and entered judgment for nominal damages on the ground that there was no substantial evidence to support the jury's finding that there was a reasonable necessity for the replacement of the highway taken by the United States.

STATEMENT

This condemnation proceeding was instituted on July 21, 1943, at the request of the Secretary of War to acquire all highway easements within a specified area of the Hanford Engineer Works, including a portion of Secondary State Highway No. 11A (R. 3–12).[1] Simultaneously, a declaration of taking was filed (R. 12–19), and $1.00 was deposited in court as just compensation for the interest of the State of Washington in the highways taken (R. 18, 21–22).

Secondary State Highway No. 11A was a graveled road extending approximately 90 miles from the city of Yakima in Yakima County in a generally easterly direction across Benton County to the town of Connell

[1] The original petition excepted from the taking that portion of Highway No. 11A lying within the project area between the right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad and the Columbia River (R. 5). However, the petition was subsequently amended to include that portion of the highway (R. 27–41). It was stipulated that July 23, 1943, was the date of taking for all purposes (R. 62).

in Franklin County (R. 64, 167–168, 198–200, 228–229; Defendant's Original Exhibit No. 2). The highway had been originally constructed in segments by the three counties through which it ran, and these segments had been maintained by the counties as county roads until 1937, when the State of Washington established a secondary road system and declared the county roads to be a secondary State highway and a branch of primary State Highway No. 11, running from Pasco in a generally northeasterly direction to Spokane (R. 164–165, 122, 227–228; Defendant's Original Exhibit No. 2; see Laws of Washington (1937), ch. 207). After being designated as a secondary State highway in 1937, Highway No. 11A was not improved in any way by the State, but thereafter the highway was maintained by the State highway department, and a free ferry was established across the Columbia River at Hanford (R. 231–232, 425, 463–464, 517).[2]

Prior to the taking, graveled highway No. 11A was the most direct route between Yakima and Connell, being approximately 33 miles shorter than the paved route over primary state highways Nos. 3 and 11 via Pasco (R. 88, 97–98, 232–233, 320, 336, 434). It also afforded the shortest route between Yakima and Spokane (R. 88),[3] and together with secondary high-

[2] Prior to the establishment of the free ferry at Hanford, the crossing of the Columbia River on the route of 11A was made by means of a privately operated toll ferry (R. 517).

[3] The distance from Yakima to Spokane over route 11A was 203 miles, while the distance over primary state highways through Ellensburg was 219 miles, and the distance through Pasco was 245 miles (R. 88, 168).

way No. 11B, which joined primary highway No. 11 a few miles south of Connell, it afforded access to the Colfax-Pullman area in eastern Washington (R. 237–238, 285–286, 334–335; Original Exhibit No. 2). However, this through traffic, including that from Yakima to Connell, was very light, there being only a daily average of 47 vehicles making the ferry crossing over the Columbia River in 1941 and a daily average of 41 vehicles in 1942 (R. 188–190, 232–233, 310, 315–317, 530),[4] and the primary purpose served by highway No. 11A was to provide access to and from towns along its route, including Hanford, and the adjacent farming area, including lands in the Priest Rapids Irrigation District (R. 241–242, 421–422, 432, 443–444, 530, 533–534, 542–544).

When the United States established the Hanford Engineer Works in 1943, and the roads within the project area were closed to the general public, all residents of the project area (Hanford, White Bluffs, and the Priest Rapids Irrigation District) were removed, leaving only government employees and em-

[4] Of course, all of the ferry traffic was not through traffic, but was made up in part of people in the Hanford-White Bluffs area traveling to Connell and beyond, and of farmers on the east bank of the Columbia River going back and forth to Hanford (R. 479, 543–544). However, there was a sharp conflict as to what percentage of the total ferry traffic was local traffic. A government witness estimated the local traffic at from 80% to 90% of the total (R. 422–424, 478–480), while appellant's witnesses estimated the local traffic at from 10% to 15% (R. 578, 587–588). Hence, the absolute maximum for through traffic was less than 40 vehicles per day on the average, and could have been as little as five vehicles.

ployees of government contractors (R. 242, 244–245, 547–550). Although a 28-mile segment of highway No. 11A was thus closed (R. 225), the two ends of the highway, i. e., from the west boundary of the project to Yakima and from the east boundary to Connell, were still available to the public and in fact were substantially improved at the expense of the Government (R. 242–244, 271–272, 551, 553). The traffic diverted from highway No. 11A has not imposed any appreciable burden on other highways (R. 426), and the former users of No. 11A have not been subjected to any particular hardship or inconvenience by being compelled to travel on primary state highways (R. 97–100, 163, 187–190, 232–233, 326–331, 425–427).

After a long delay, during which attempts were made to negotiate a settlement of the matter (R. 82–83, 279–281; Original Exhibit No. 10), the case came on for trial before a jury in May of 1951 (R. 61). Appellant offered many witnesses (residents of the area, road engineers and state legislators), who testified that in their opinions a substitute road for highway No. 11A was necessary to connect Yakima and Connell, to preserve its cross-state features, and to provide for the prospective development of the South Columbia Basin (R. 70–407; see especially R. 94–101, 158–165, 187–191, 227, 232–245, 286, 294–299, 310–311, 320, 326–331, 336–337, 341–343, 345–350, 355–357, 361–362, 373–374, 377–381). The court excluded evidence as to the prospective development of the Columbia Basin (R. 126–152), and later instructed the jury that in the determination of the necessity for replace-

ment of highway No. 11A the anticipated development of the Columbia Basin was not to be considered (R. 599). In furtherance of its case, appellant also offered testimony as to a proposed substitute road which would be constructed, partly over existing county roads, from the junction of No. 11A at the westerly boundary of the project area in a northerly direction to Vernita on the Columbia River, across the river at that point by free ferry, then northerly to Beverly, then easterly to Othello, and thence southerly to Connell, at an estimated cost of $1,117,556.58 (R. 66–67, 72–73, 206, 215). This proposed substitute road between Yakima and Connell would be substantially longer than the original No. 11A, and would in fact be longer than the primary route through Pasco (R. 336, 433–434, 617). In traveling from Yakima to Spokane, the proposed substitute would be one mile longer than the paved road through Ellensburg (R. 88, 330).

At the completion of appellant's case in chief, the Government moved for a directed verdict in a nominal sum on the ground that reasonable necessity for a substitute road had not been shown (R. 408–414). This motion was denied (R. 414–415), and the Government presented its evidence as to necessity (R. 417–556), including several experts who testified that in their opinions no substitute was necessary because traffic diverted from No. 11A was adequately cared for on existing roads (R. 425–428, 436–437, 503–505, 516–520). One of these witnesses testified that, if a substitute road were in fact necessary, the route pro-

posed by appellant was the only possible substitute (R. 510, 524–525).

After appellant's rebuttal (R. 556–591), the Government renewed its motion for directed verdict, which was denied (R. 591). The jury found that there was a reasonable necessity for the construction of a substitute highway and returned a verdict for $581,721.91 (R. 45, 614). The Government filed a motion for reduction of the verdict to $1.00, or in the alternative for new trial (R. 45–46). After argument thereon, the court determined that the verdict should be vacated and judgment entered for nominal damages (R. 46, 615–619), holding that, since there were established highways shorter than the proposed substitute, and since there was no evidence that such highways were not capable of handling the total traffic, there was no substantial evidence of necessity for a substitute road (R. 617–618). In stating his reasons for this action the court expressed the opinion that the jury had been overimpressed by two considerations: (1) that a road costing a considerable amount of money had been taken and hence the government should pay for it and (2) that, despite rulings sustaining objections concerning the matter, there should be a highway connection between Yakima and the Columbia Basin area because of prospective development there (R. 615–616). An order setting aside the verdict and entering judgment for $1.00 was entered on February 7, 1952 (R. 47–48).[5] This appeal followed (R. 54).

[5] No formal action was taken on the alternative motion for new trial, so that if it were conceivable that in fact there was sub-

ARGUMENT

The district court was correct in setting aside the jury verdict and entering judgment for nominal damages on the ground that the necessity for a substitute road had not been established by substantial evidence

This appeal presents as the ultimate issue whether there was no substantial evidence to support the jury's finding that there was a reasonable necessity for replacement of the portion of the highway taken, so that the district court was justified in setting aside the jury verdict and entering judgment for nominal damages. The determination of this issue requires consideration of the established standards of reasonable necessity and substantial evidence, and the application of such standards to the evidence at hand. It is submitted that after such consideration the correctness of the district court's action will be conclusively demonstrated.

A. If the traffic diverted from the highway taken can be adequately handled by existing highways without unreasonable inconvenience to the traveling public, there is no necessity for a substitute road and appellant is not entitled to more than nominal compensation

"The overwhelming weight of modern authority is to the effect that a municipality, a county, a State, or other public entity is entitled to compensation for the taking of a street, road or other public highway *only to the extent that, as a result of such taking, it is compelled to construct a substitute highway.*" [6] *State of*

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stantial evidence to support the jury verdict, this Court should not reinstate the verdict, but rather should remand with directions to pass on the motion for new trial. *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254–255 (1940).

[6] Emphasis in original.

California v. *United States,* 169 F. 2d 914, 924 (C. A. 9, 1948). In other words, in such cases the measure of compensation "is the cost of providing any necessary substitutes. When no substitute facilities are necessary, it follows that no compensation is allowed." *United States* v. *City of New York,* 168 F. 2d 387, 389 (C. A. 2, 1948). See also *Jefferson County, etc.* v. *Tennessee Valley Authority,* 146 F. 2d 564 (C. A. 6, 1945), certiorari denied 324 U. S. 871 (1945); *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786, 790 (C. A. 4, 1945); *United States* v. *Des Moines County,* 148 F. 2d 448 (C. A. 8, 1945), certiorari denied 326 U. S. 743 (1945); *Woodville* v. *United States,* 152 F. 2d 735 (C. A. 10, 1946), certiorari denied 328 U. S. 842 (1946); *United States* v. *Los Angeles County, Cal.,* 163 F. 2d 124 (C. A. 9, 1947); *United States* v. *State of Arkansas,* 164 F. 2d 943 (C. A. 8, 1947).

The application of this well established principle in any given case will depend upon its own peculiar facts. In cases where the Government condemns a large area and also takes highways which served only as access roads within the area, it is plain that the municipality is entitled only to nominal compensation, because the need for the roads has disappeared with the establishment of the government project. *City and County of Honolulu* v. *United States,* 188 F. 2d 459, 461 (C. A. 9, 1951), certiorari denied 342 U. S. 849 (1951); *State of California* v. *United States,* 169 F. 2d 914, 925 (C. A. 9, 1948); *Woodville* v. *United States,* 152 F. 2d 735, 737 (C. A.

10, 1946), certiorari denied 328 U. S. 842 (1946); *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786 (C. A. 4, 1945). The mere fact that a road, in which the local authorities may have made some investment, is taken does not mean that substantial compensation must be paid. In *State of California* v. *United States,* 169 F. 2d 914, 924 (1948) this Court repeated the reason why this is so, as follows:

> Thus, if it is unnecessary to replace a road or to provide a substitute, the claimant here has suffered no money loss and has been relieved of the burden of maintaining the road taken.

It is likewise clear that the Government is required to provide a substitute road or the equivalent in money when it takes a segment of an arterial highway and there is in existence no other road or roads which can adequately handle the traffic diverted from the road taken. In such cases the only real dispute is as to the amount necessary to provide the necessary substitute. *City of Fort Worth, Tex.* v. *United States,* 188 F. 2d 217 (C. A. 5, 1951); *United States* v. *State of Arkansas,* 164 F. 2d 943 (C. A. 8, 1947); *Jefferson County, etc.* v. *Tennessee Valley Authority,* 146 F. 2d 564 (C. A. 6, 1945), certiorari denied 324 U. S. 871 (1945). But this does not mean that in every case where a segment of a through highway is taken the Government is obliged to provide a replacement. If after the taking the highway system provides "road facilities equal in utility to

those destroyed," there is no requirement that additional facilities be provided. *Jefferson County, etc.* v. *Tennessee Valley Authority,* 146 F. 2d 564, 565 (C. A. 6, 1945), certiorari denied 324 U. S. 871 (1945); *City of Fort Worth, Tex.* v. *United States,* 188 F. 2d 217, 223 (C. A. 5, 1951). In other words, the substitute for the road taken may be found in other parts of the highway system. And no substantial compensation is due to the State if such other roads "serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such system would have provided had the facility in question not been condemned, so far as this is reasonably practical." *City of Fort Worth, Tex.* v. *United States,* 188 F. 2d 217, 222 (C. A. 5, 1951); *United States* v. *City of New York,* 168 F. 2d 387, 390 (C. A. 2, 1948), affirming *United States* v. *25.4 Acres of Land,* 71 F. Supp. 255, 257 (E. D. N. Y., 1947); *United States* v. *0.886 of an Acre of Land, etc.,* 65 F. Supp. 827, 828–829 (E. D. N. Y., 1946); *United States* v. *Alderson,* 53 F. Supp. 528, 530–531 (S. D. W. Va., 1944). And, as stated in *United States* v. *Alderson,* 53 F. Supp. 528, 530 (S. D. W. Va., 1944), in determining what is reasonably practical:

> The test is not what the State wants to build; not what the property owners want for their properties; and not what is the desirable thing to do. Both parties to this litigation would be very anxious to give these people the best roads possible. That would be the most desirable thing to do, but such is not the test. The question is, what is the most reasonable thing under all the circumstances?

See also *United States* v. *0.886 of an Acre of Land, etc.,* 65 F. Supp. 827, 828 (E. D. N. Y., 1946).

B. The court should set aside a jury verdict and enter judgment notwithstanding the verdict, when the evidence of necessity is not of such quality as to convince an unprejudiced, reasonable mind [7]

It is well settled that on a motion for directed verdict or judgment notwithstanding verdict, "the evidence adduced by the opposing party shall be taken as true and all reasonable inferences deducible therefrom shall be given their most favorable intendment." *Smith* v. *Shevlin-Hixon Co.,* 157 F. 2d 51, 53–54 (C. A. 9, 1946). Thus, it has often been said as to situations where there is substantial evidence on both sides, "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35 (1944); *Butte Copper & Zinc Co.* v. *Amerman,* 157 F. 2d 457 (C. A. 9, 1946). However, in making the primary determination as to whether or not there is substantial evidence a district judge is not a "mere automaton." *Gunning* v. *Cooley,* 281 U. S. 90, 93 (1930). He must determine, "not whether there is literally no evidence, but whether there is any upon

[7] Of course, the power of the district court to enter judgment notwithstanding verdict presents a federal question. *Herron* v. *Southern Pacific Co.,* 283 U. S. 91, 93–95 (1931); *Murphy* v. *United States District Court, etc.,* 145 F. 2d 1018 (C. A. 9, 1944), dismissed on stipulation, 325 U. S. 891 (1945). However, as pointed out by appellant (Br. 16), the question as to whether state or federal law should apply is immaterial, since both jurisdictions follow the same rule.

which a jury can properly proceed to find a verdict for the party producing it." *Improvement Company* v. *Munson,* 14 Wall. 442, 448 (1871); *Butte Copper & Zinc Co.* v. *Amerman,* 157 F. 2d 457, 458 (C. A. 9, 1946). The crux of the matter is whether there is substantial evidence. But, "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co.* v. *Labor Board,* 305 U. S. 197, 229 (1938). It "must do more than create a suspicion of the existence of the fact to be established." *Labor Board* v. *Columbian Co.,* 306 U. S. 292, 300 (1939). As more elaborately defined in *National Labor Relations Board* v. *Thompson Products,* 97 F. 2d 13, 15 (C. A. 6, 1938):[8]

> "Substantial evidence" means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

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[8] This case was favorably cited by the Supreme Court in connection with the above quotations from *Edison Co.* v. *Labor Board*, 305 U. S. 197, 229 (1938), and *Labor Board* v. *Columbian Co.*, 306 U. S. 292, 300 (1939); and the following quotation was quoted by this Court in *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. 2d 153, 177 (C. A. 9, 1938).

> The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought.

Hence, when the evidence is so overwhelmingly on one side as to leave no doubt what the fact is, the trial court may and should direct a verdict or render judgment notwithstanding the verdict. *Brady* v. *Southern Ry. Co.,* 320 U. S. 476, 479–480 (1943); *Gunning* v. *Cooley,* 281 U. S. 90, 93–95 (1930); *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569, 573–575 (C. A. 9, 1948), certiorari denied 336 U. S. 924 (1949); *Galloway* v. *United States,* 130 F. 2d 467, 470–471 (C. A. 9, 1942), affirmed 319 U. S. 372 (1943); *De Zon* v. *American President Lines,* 129 F. 2d 404, 407 (C. A. 9, 1942), affirmed 318 U. S. 660 (1943); *Deere* v. *Southern Pac. Co.,* 123 F. 2d 438, 440 (C. A. 9, 1941), certiorari denied 315 U. S. 819 (1942). And, as we will show later, infra p. 21, an opinion of a witness cannot be considered to be substantial evidence when it is contradicted by established fact. It will now be demonstrated that the evidence at hand makes this proceeding such a case.

C. There was no substantial evidence that a substitute road was necessary because of the taking

Inasmuch as all private individuals formerly living within the area of the Hanford Engineer Works and relying upon No. 11A for access to Yakima or Connell were removed from the area, and inasmuch as the ends

of No. 11A, which were not taken, now afford better local access to those living outside the project area than they had before the taking (R. 242–245, 271, 547–553), it is undisputed that the Government's taking of a segment of No. 11A did not require the construction of any substitute local access roads (R. 150, 598). Hence, appellant must necessarily pitch its claim for substantial compensation solely upon the theory that a replacement for highway No. 11A was necessary as part of the state highway system to take care of the traffic between Connell and Yakima and also cross-state traffic (R. 68–69). However, the physical facts demonstrate that there likewise was no necessity for a substitute road to serve such purposes.

Two engineers in the state highway department, both of whom had been intimately connected with the district in which highway No. 11A was located (R. 306, 419, 420),[9] testified that at the time of taking in 1943, No. 11A was a very unimportant part of the state highway system and that traffic thereon was

[9] Norman Hill was district engineer for the Yakima district from 1935 until early in 1942, when he transferred to Olympia as maintenance engineer at headquarters (R. 419, 420–421). Except for the period from 1945 to 1949, he was employed at the headquarters of the highway department up to and including the trial (R. 419). He was called as a witness by the Government (R. 417, 419). Mr. T. P. Doyle, a witness called by appellant, had been district engineer for the Yakima district since 1945, and prior to that time had been assistant engineer for approximately 17 years (R. 306).

very light (R. 310, 422–424, 426). Counts of traffic across the free ferry at Hanford, which of course would be the absolute maximum of the through traffic on No. 11A, showed a daily average of 47 vehicles in 1941, and 41 vehicles in 1942 (R. 316–317). And according to the estimates of state highway engineers from 80% to 95% of this traffic was local traffic, i. e., originating or terminating in the Hanford-White Bluffs area, including the Priest Rapids Irrigation District (R. 422–424, 478–480; see also R. 241–242, 443–444, 530, 534, 543–544). Hence, it would follow that the through traffic on No. 11A averaged approximately 10 vehicles a day at the most (R. 423). It is true that two ferry operators, called as witnesses by appellant, estimated that local traffic was only 10% or 15% of the total ferry traffic (R. 397, 578–579, 587–588). However, it is clear that these witnesses were not only making a very rough guess (R. 398–399, 578–579, 587–588), but also had no way of determining what traffic was local unless the travelers were known to them to be residents of the area (R. 398–399, 578, 587). Of course, any strangers might have been visitors in the area rather than through travelers, or might even have been new residents, since the Priest Rapids Irrigation District was then being settled (R. 527, 539–540, 542). And many of the out of state automobiles noted by the ferry operators were no doubt those of new settlers from Utah and other

states (R. 539–540, 542).[10] Thus, it is plain that there is no evidence which would convince a reasonable man that the through traffic on No. 11A, including that between Yakima and Connell, averaged more than 10 vehicles a day.

The lightness of the through traffic on No. 11A is readily understandable. The users of the road were faced with a ride of 90 miles on a graveled road with all its inconveniences, including dust and a rough surface (R. 161, 328, 347, 403, 425–426, 435–436, 447–448, 464, 478–479, 529, 532, 535), and in addition a delay due to the necessity of crossing the Columbia River by ferry (R. 99, 435). However, there was also available for travel between Connell and Yakima a paved highway by way of Pasco, where there was a bridge over the Columbia River (R. 385). Although this route was approximately 33 miles longer than No. 11A, the journey was more comfortable and faster, or at least entailed little or no loss in time (R. 98–100, 161, 163, 188, 232–233, 425–426, 437, 535–536,

[10] The ferry operators testified that they had entered the count of out of state vehicles in the column of the ferry log headed "Trucks" (R. 577–578, 582–583, 587). This would indicate that 8% of the ferry traffic carried out of state registration in 1941, and 4% in 1942 (see R. 316–317). These percentages emphasize the weaknesses in the estimates of the ferry operators as to the percentage of through traffic and check very well with the estimates of the highway engineers, especially when it is considered that many of the travelers in out of state vehicles could be visiting in the area or new residents. See Appendix to Appellant's Brief, pp. 153–154, 167.

541).[11] Similarly, for travel between Yakima and Spokane the paved route through Ellensburg was only 16 miles longer than No. 11A and was much preferable (R. 188–189, 232). Likewise, travelers from Yakima to the Pullman-Colfax area in eastern Washington preferred the paved route through Pasco (R. 155, 165).

Thus, it is plain that when the Government closed No. 11A as it went through the Hanford project, there were already in existence reasonably adequate substitute roads, i. e., the paved primary highways through Pasco and Ellensburg (R. 426–427). The former users of No. 11A have suffered little or no inconvenience, either in the comfort, time, or expense of their travel, in being confined to the primary highways (R. 99–100, 161, 163, 187–190, 232–233, 239–241, 426–427, 535–536). And the diversion of the through traffic from No. 11A, whether it be 10 vehicles or 40 vehicles per day, has not imposed any appreciable burden on the other highways (R. 426). Indeed, the light traffic diverted from No. 11A, amounting only to one or two cars per hour at the most, would hardly be noticed on the paved highways. Consequently, it follows that the existing highways were adequate substitutes for No.

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[11] Some of the appellant's witnesses, residents of the Connell area, complained that they lost time in using the paved route because of traffic congestion in going through Pasco and Kennewick (R. 98–99, 342–343, 347, 357). However, one of these witnesses admitted making the 123-mile drive, at a time when traffic was congested, in 3 hours (R. 336), an average of 41 miles per hour for the entire trip. Clearly, travel over the gravel road could not be any faster.

11A, and that there was and is no necessity for a replacement road. *United States* v. *City of New York,* 168 F. 2d 387, 389 (C. A. 2, 1948); *State of California* v. *United States,* 169 F. 2d 914, 924 (C. A. 9, 1948); *City of Fort Worth, Tex.* v. *United States,* 188 F. 2d 217, 222, 223 (C. A. 5, 1951). And this is especially true when it is considered that the only feasible new route (R. 65–66, 321, 510) would, in addition to having all the inconveniences of a graveled road and a ferry crossing (R. 67, 435), be slightly longer than the already existing paved roads (R. 88, 330–331, 433–434, 617).

Appellant's brief, without citing record references, states (Br. 25) that at the time of the taking in 1943 traffic on the paved highways through Pasco and Ellensburg had already reached the saturation point. Insofar as this statement could have any materiality in the determination as to the necessity of a substitute road because of the closing of No. 11A, it has no support in the evidence. There was testimony that the capacity of a two lane highway was an average of approximately 4,000 vehicles per day (R. 287). There was also testimony that the highway bridge at Pasco was a two lane bridge (R. 385) and that in 1943 an average of 4,300 vehicles per day crossed the bridge (R. 322–323).[12] However, this evidence is of no materiality here. In the first place, even without

[12] Except for the Pasco bridge between Pasco and Kennewick and the segments of the highways immediately adjacent to Yakima, traffic on the two paved highways was well below the estimated capacity of two-lane highways (R. 322–323).

the negligible amount of traffic diverted from No. 11A, traffic on the Pasco bridge would exceed the estimated capacity. In all fairness, the United States should not be required to alleviate a condition which would exist whether or not No. 11A was closed. This is especially so since the proposed substitute would not draw any substantial amount of traffic from the existing roads (R. 342). Moreover, the count (a daily average for the entire year of 1943) does not take into consideration the fact that after the establishment of the Hanford Engineer Works early in 1943, there was a large increase in traffic in the area because of the construction and the influx of workers (R. 324, 539). But inasmuch as it would be the State's responsibility to handle this increased traffic, which would be present regardless of whether No. 11A was open or closed, such increase cannot be considered in determining the necessity of a substitute. *United States* v. *Alderson,* 53 F. Supp. 528, 530–531 (S. D. W. Va., 1944); cf. *United States* v. *City of New York,* 168 F. 2d 387, 390 (C. A. 2, 1948). Hence, while traffic counts covering 1942 and the early part of 1943 might be of some significance,[13] it follows that the evidence relied upon (Br. 25, 26–27) has no tendency to establish necessity for a substitute road resulting from the closing of No. 11A. It is clear, therefore, that any need for additional road facilities arises from reasons other than the taking of No. 11A, and that the Government has no liability therefor.

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[13] Inasmuch as these traffic counts were in the possession of the state highway department, it is especially significant that they were not offered.

In its contention that there was substantial evidence to support the jury verdict that a substitute road was necessary, appellant relies chiefly upon the opinions expressed by road engineers, state legislators, and residents of the area (Br. 25–30, 34–37). However, these opinions, without any support in the demonstrated facts relating to necessity (*supra,* pp. 15–20), can have no weight here. *Galloway* v. *United States,* 319 U. S. 372, 396 (1943); *Neel* v. *Henne,* 30 Wash. 2d 24, 36–37, 190 P. 2d 775, 781–782 (1948); *Prentice etc. Co.* v. *United Pac. Ins. Co.,* 5 Wash. 2d 144, 164, 106 P. 2d 314, 323 (1940); cf. *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 178 (C. A. 9, 1950), certiorari denied 340 U. S. 820 (1950). They completely ignore such important factors as the light traffic on No. 11A, the local nature of the majority of the traffic, and the availability of adequate substitutes for through traffic over better roads and shorter distances than the proposed substitute, all of which factors were acknowledged by appellant's witnesses (R. 239–245, 310, 326–331). Indeed, witness Doyle, district engineer, admitted that No. 11A was a very unimportant highway (R. 310), and witness Dougherty, a resident of Connell (R. 331), indicated his belief that there would not be much traffic on the proposed substitute (R. 342). Other factors relied upon by appellant's witnesses in support of their opinions are clearly irrelevant here. For example, witness Doyle testified that after the closing of No. 11A, there was no crossing over the Columbia River for a distance of 90 miles between Pasco and Vantage

(R. 385, see Br. 36). However, inasmuch as the Hanford project now occupies the land on both sides of the river for most of this distance (R. 410; Original Exhibit No. 3), it is obvious that there is no necessity for the State to maintain a crossing. Also, many of the witnesses based their opinions of necessity in whole or in part upon the need of a road similar to No. 11A in the potential development of the South Columbia Basin area (R. 95–97, 156, 159, 282, 286, 295, 320–321, 360, 369, 373–374, 375–376, 378–381). The jury was instructed to disregard the anticipated development of the Columbia Basin (R. 599–600), so that opinions based upon such a factor cannot be considered of any substance.

Moreover, analysis of the testimony of appellant's witnesses will clearly reveal that, rather than testifying as to the "necessity" for replacement of No. 11A, they were merely testifying that in their opinion there was a demand for relocation, or that relocation was desirable (see especially R. 96–97, 158–159, 164, 190, 305, 335–337, 345, 355; Br. 36). It is not disputed that an alternative route would be desirable and would be of benefit to some people. However, such is not the test in determining the Government's liability to provide any necessary substitute roads. *United States* v. *Alderson,* 53 F. Supp. 528, 530, (S. D. W. Va., 1944); *United States* v. *0.886 of an Acre of Land, etc.,* 65 F. Supp. 827, 828 (E. D. N. Y., 1946). The facts speak for themselves. In face of the facts, the opinions relied upon furnish no support for a conclusion

that a substitute road is necessary.[14] Appellant's reasoning that the Government should pay for a relocation of No. 11A may be epitomized in the words of witness Klindworth: "* * * we had a road in there before the Atomic Energy Commission came in, and we should have one now" (R. 357; see also Br. 36).

Appellant (Br. 27–29) apparently would have the opinions of the state engineers given conclusive effect on the question of necessity because of the wording of state statutes. Clearly, such a contention is without merit. Adoption of the contention would mean that the state highway department would fix the compensation which the United States must pay for the taking of property. But the determination of the amount of just compensation is exclusively a judicial question. It may not be decided by any other branch of government. *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, 327 (1893); *United States* v. *New River Collieries,* 262 U. S. 341, 343–344 (1923). And the need for substitute roads must rest on the facts of each case. Accordingly, factual necessity, without reference to the mandates of local law, is the

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[14] Appellant states (Br. 37) that the opinion of Lars Langloe, a government witness, appears to sustain the jury verdict. The testimony referred to (R. 525) is only to the effect that the proposed road would be a reasonable substitute for No. 11A, and has no bearing on the question of necessity for a substitute. See R. 503–505, 526, where this witness clearly states his opinion that no substitute was necessary because of the lack of traffic. The testimony referred to can only mean that if a substitute were necessary, the proposed route would be a reasonable and the only possible substitute (R. 510, 524).

sole consideration in determining the question of necessity to relocate a road taken. Cf. *United States* v. *Des Moines County,* 148 F. 2d 448, 449 (C. A. 8, 1945), certiorari denied 326 U. S. 743 (1945); *United States* v. *Los Angeles County, Cal.,* 163 F. 2d 124, 125 (C. A. 9, 1947).

Appellant (Br. 29–34) also relies heavily upon the contents of Original Exhibit No. 10 (set out at pages 51–131 of the Appendix to Appellant's Brief) as sustaining the jury's finding of necessity. We disagree with appellant's analysis of the force of the material in this exhibit. But more important, the material was not before the jury for consideration in determining necessity. This exhibit was admitted in evidence upon the understanding that the jury would be instructed as to what consideration they should give to it (R. 281, 289). The jury was later instructed as follows (R. 603):

> You will likewise consider Exhibit 10, being correspondence and copies thereof passing between representatives of the parties hereto, only as it explains the delay in the trial of this cause and in the determination of the location of the substitute route to replace highway 11–A. No expressions of opinion or statement of cost in that exhibit shall be considered by you as evidence in any other connection.

And appellant made no exception to such limited consideration (R. 611–614). Obviously, the exhibit can not now be pointed to as any evidence of necessity for a substitute.

Lastly, appellant argues (Br. 38–40) that the district court improperly excluded evidence which would have established necessity for replacement of No. 11A. This evidence consisted of Exhibits Nos. 5, 6, 11 and 11A (reports as to the recommended highway system for the Columbia Basin; see R. 126–147, 282–283, 301–304; App. 133–175),[15] Exhibits Nos. 7 and 8 (commercial and industrial studies of the City of Yakima and the Yakima Valley; see R. 170–178), and certain testimony of witness Berkey relating to development of the Columbia Basin (R. 149–151). Inasmuch as appellant did not specify these matters in its statement of points on appeal (R. 56–57), and inasmuch as these points are not adequately raised in the specifications of error in this Court (Br. 14–15), it does not appear that appellant can now rely upon such alleged errors of the court below. *Jung* v. *Bowles,* 152 F. 2d 726, 727 (C. A. 9, 1946). In any event, it is submitted that there was no error in the exclusion of the evidence.

All of the evidence referred to was objected to and excluded in part upon the ground that the evidence referred to a period too remote from the date of taking to have any materiality (R. 112–130, 136–139, 145–147, 149, 151, 172, 175–178, 301–304). Such exclusion is within the sound discretion of the trial court. *Jones* v. *United States,* 258 U. S. 40, 48–49 (1922); *United States* v. *25.406 Acres of Land, etc.,*

[15] References to the Appendix to Appellant's Brief are indicated "App. ——."

172 F. 2d 990, 993 (C. A. 4, 1949), certiorari denied 337 U. S. 931 (1949); *United States* v. *Block,* 160 F. 2d 604, 607 (C. A. 9, 1947); *Clark* v. *United States,* 155 F. 2d 157, 161 (C. A. 8, 1946). And there is no showing here that the discretion was abused. Obviously, the occurrence of events five years after the taking and the potentialities in the more distant future could have little bearing on whether a new road was made necessary by the Government's taking in 1943. Rather, there is every indication that some event other than the taking was giving rise to the necessity.

There are additional reasons why there was no error in the exclusion of the evidence. As to Exhibits Nos. 7 and 8, they contained voluminous statistics as to the economy of the City of Yakima and the Yakima Valley in the period from 1940 to 1949 (R. 177). When it was pointed out that the exhibits contained much irrelevant matter (R. 175–176), appellant's counsel stated that they were offered to show what services and facilities were available in Yakima and the surrounding area in 1943, rather than for the statistical material, and that the information desired could be obtained from the witness (R. 176–177). Inasmuch as the witness was permitted to testify as to the nature of the community in 1943 (R. 178–185), including population trends (R. 182–184), and was permitted to testify that the only difference between 1943 and 1948 was that the facilities had expanded (R. 170–171), it appears that appellant got into evidence more than it desired through the exhibits. Clearly,

there was no error in excluding the bulky and admittedly misleading exhibits (R. 176) under these circumstances.

The road planning exhibits (Nos. 5, 6, 11, and 11A) were also properly excluded for other reasons as well as for remoteness. The statute under the authority of which the study was initiated provided for a survey concerning "present and future requirements for the establishment of public highways which may be necessary or *convenient* [16] in serving areas which may be reclaimed" (R. 134). The investigation which the reports covered was made "to plan *desirable* additions to and modifications of the road net" (App. 135, 159). Obviously, the reports covered more than *necessary* roads, which is the only issue here, and it would have been misleading to submit such reports to the jury without opportunity to cross-examine the writers of the reports.

Moreover, the plans are described as merely "general and tentative" (App. 141) and the report (Exhibit No. 5) bears the caution that, "The publication of the reports is not intended to indicate, of course, that suggestions and recommendations contained in them necessarily will be approved and carried out by the Bureau" of Reclamation and that other participating agencies are not in any way bound by the reports (App. 134–135).That the reports are in fact "general and tentative" is well illustrated by the fact that, while the original state report was made in 1941 on the basis of the average farm being 40 acres, the esti-

[16] Emphasis added unless otherwise noted.

mate at the time of the federal report in 1944 was that the average farm would be 60 acres (App. 155, 156–157). Obviously, any further increase in the size of the farm units will make a great difference in the traffic estimates. Further, it is plain that changes in the proposed plan will be necessary by virtue of the fact that some of the lands in the Columbia Basin project at the time of the studies are now in the Hanford project (Cf. App. 149 and Original Exhibit No. 3). Clearly, therefore, these reports are too speculative in their nature to be of any materiality.

It is further submitted that even if the reports had been admitted, they would not be substantial evidence that a substitute road was needed at the time of taking. The state report concludes (App. 161; see also App. 168–169):

> Inasmuch as water will not be available for irrigation before 1944,[17] it will undoubtedly be several years before it will be necessary to construct any new roads in the area. The existing highways are adequate for the present needs and so far as circumstances are predictable for several years in the future.

Plainly, necessity for replacement of No. 11A is negatived by this report and a consideration of the facts as they existed in 1943.

Indeed, the reports contain still further proof that the United States should not be held liable for the re-

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[17] The report was written in 1941. At the time of trial in 1951 the testimony was that lands in the vicinity of Othello would not be under water until 1953, and lands in the vicinity of Mesa (the area of particular concern here) would not be under water until 1954 (R. 113–114).

placement of No. 11A. While the reports contain passing references to No. 11A as an existing secondary highway (App. 151, 170, 171, 174), they do not propose any improvement in that highway, except for the stretch between Yakima and Cold Creek, which the Government has already improved and is open to the public (R. 242–244, 551). Rather the reports propose a primary highway (A–2) following approximately the same route as appellant's proposed substitute for 11A. (App. 149, 151, 157–158, 170, 173–174; cf. Original Exhibit No. 3.) Obviously, this new primary road was proposed in 1941 to replace the primary highways through Ellensburg and Pasco and to afford better conditions for traffic between Spokane and Yakima and other cross-state traffic (App. 151, 157, 173). Just as obviously No. 11A was to be abandoned as a carrier of cross-state traffic. Under these circumstances, accepting the reports at their face value, it is clear that construction of a road over the route proposed in this condemnation case has been found necessary for reasons other than the taking of a part of No. 11A, and that therefore the expense of any part of the road cannot be charged to the Government. *United States* v. *City of New York,* 168 F. 2d 387, 390 (C. A. 2, 1948).

In summary, it may be stated that the physical facts demonstrate conclusively there is no necessity for replacing any part of No. 11A because of the Government's taking, and that in the face of the physical facts the opinions expressed by appellant's witnesses have no substance. Inasmuch, as the other evidence relied upon by appellant as substantial evidence of

necessity was not before the jury, and properly so, the court did not err in setting aside the verdict and entering judgment in a nominal amount on the ground that there was no substantial evidence of necessity. Indeed, appellant's reliance (Br. 29, 30–34, 38–40) upon excluded evidence to support the jury's verdict gives added weight to the district court's definite impression (R. 615) that the verdict was influenced by such factors.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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